

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT RICHARD KETTERMAN

Claimant

VS.

CITY OF LAWRENCE

Self-Insured Respondent

Docket No. 1,030,872

ORDER

STATEMENT OF THE CASE

Respondent requested review of the May 2, 2008, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Gerald L. Cooley, of Lawrence, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay for claimant's medical treatment with Dr. Dan Gurba for right knee replacement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 29, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant's alleged injury did not arise out of and in the course of his employment and, therefore, the ALJ exceeded his jurisdiction in ordering respondent to provide medical benefits to claimant for right knee replacement. Respondent contends that claimant's degenerative arthritis in his right knee existed before his January 9, 2006, injury to his left knee and there is no specific evidence to indicate that the right knee arthritis was aggravated or accelerated by the injury to claimant's left knee.

Claimant argues that his right knee condition is a direct and natural result of his January 9, 2006, injury to his left knee and, therefore, arose out of and in the course of his employment with respondent.

The issue for the Board's review is: Did claimant's right knee condition arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent for over 16 years as a solid waste operator. He drove a sanitation truck that picked up construction trash boxes and compactors, hauled the debris to the landfill, and then returned the boxes and compactors to the construction site. He was required to get in and out of the truck many times a day.

On January 9, 2006, claimant arrived at the landfill with a box to dump. While there, his left foot fell into a hole and he lost his balance, injuring his left knee. Claimant was seen at Lawrence Memorial Hospital two days after his accident and was subsequently seen by Dr. Chris Fevurly. He was referred to Dr. Richard Wendt for arthroscopic surgery that consisted of a partial medial meniscectomy. He had physical therapy but became progressively worse. His care was transferred to Dr. Dan Gurba, and he underwent total knee replacement arthroplasty on November 29, 2006. The costs of this treatment to claimant's left knee were paid for by respondent under workers compensation.

Claimant was released to return to work on March 30, 2007, with a restriction of no jumping on and off the rear of the sanitation vehicle. However, according to claimant, he had to fight respondent to return to work, saying respondent wanted him to go on disability. On June 11, 2007, claimant returned to his truck driver position with respondent. Dr. Fevurly's report of June 14, 2007, indicated that claimant had returned to full and regular duties without significant problems, other than intermittent swelling in the left knee. Claimant testified, however, that after he returned to work, both his knees started hurting, but the right was worse than the left. He again went to see Dr. Fevurly, who took him off work for a week. The time off helped the symptoms in his left leg, but he still had severe pain in his right leg.

Claimant had anterior cruciate ligament (ACL) repair on his right knee in the 1980s. He stated that he had trouble off and on with his right knee beginning sometime in the 1990s, and he was treated by Dr. Fevurly for chronic right knee pain and degenerative arthritis. Dr. Fevurly's records indicate that claimant had been considered for a total knee arthroplasty on the right several years before the January 2006 injury to his left knee.

On July 27, 2007, at the request of claimant's attorney, claimant was seen by Dr. Lynn A. Curtis. The history taken by Dr. Curtis indicates:

Unfortunately, because of the injury to the left knee, he has had to strain the right knee, which he has had surgery on in the past. He now has a painful right knee. By the end of the day, both knees are hurting.¹

Dr. Curtis diagnosed claimant with left knee injury status post arthroscopy and post left knee replacement, aggravation of his right knee degenerative joint disease, and aggravation of his lumbar degenerative joint disease.

On October 11, 2007, claimant was seen by Dr. Peter Bieri at the request of the ALJ. Concerning claimant's right knee, Dr. Bieri stated: "There were no signs of acute or chronic inflammation. There was slight to moderate tenderness to palpation diffusely, more so at the patellofemoral joint. Active range of motion was judged full and unrestricted."² Dr. Bieri went on further to state:

The claimant reports an increase in right knee pain, which he attributes to overcompensation from the injury to [the] opposite lower extremity. In the absence of documentation regarding specific diagnostic and treatment interventions involving the right knee, it is not possible at this time, within reasonable medical probability, to assign a permanent impairment of the right knee based upon symptomatology attributable to the injury in question.³

Claimant testified that Dr. Bieri only focused on his left knee, even though he told him he was having problems with his right knee at the time.

Claimant was seen by Dr. Edward Prostic on January 4, 2008, at the request of claimant's attorney. Dr. Prostic took a history of claimant's accidental injury to his left knee, the treatment of the left knee, and claimant's complaints concerning his right knee problems.

Claimant told Dr. Prostic that he had reconstruction of his right ACL in the late 1980s. He told Dr. Prostic he had chronic difficulties with his right knee which caused him to give up jogging and racquetball. However, claimant testified at the preliminary hearing that he quit jogging and running in the middle 1990s because he started putting on weight and it affected his breathing.

After examining claimant, Dr. Prostic stated that claimant sustained an injury to his left knee and as a result of favoring his left knee, accelerated osteoarthritis of the right

¹ P.H. Trans., Resp. Ex. A at 4.

² Dr. Bieri's report filed Oct. 16, 2007, at 5.

³ *Id.* at 6.

knee. Dr. Prostin believed that claimant was a candidate for total knee replacement on the right.

Dr. Fevurly issued a report to respondent on January 21, 2008, in which he indicated: "Prior to [claimant's] return to work [in June 2007], he had further problems with his right knee that had been a chronic, pre-existing complaint for several years prior to the work event of January 9, 2006."⁴ Dr. Fevurly indicated that he had seen claimant in the late 1990s for chronic right knee pain. He said he had allowed claimant to continue to work in spite of advancing progressive degenerative arthritis of the right knee. Dr. Fevurly opined:

The factors causing the advanced degenerative arthritis in the right knee are not related to his occupation and there is little to [sic] scientific literature to support that the total knee arthroplasty on the left side would cause an acceleration of the already advanced degenerative arthritis in the right knee.

It is my opinion that [claimant] is a candidate for total knee replacement arthroplasty on the right; however, it remains my opinion that it is not a work-related condition and there is no history of work factors that leave one to believe that it accelerated, aggravated or caused the osteoarthritis of the right knee. He has been considered for a total knee arthroplasty on the right side for several years pre-existing the events of January 6, [sic] 2006.⁵

Claimant was seen by Dr. Joseph Huston on April 15, 2008, at the request of the ALJ for an independent medical examination. Claimant brought with him an x-ray of his right knee taken August 29, 2007, that showed advanced and severe degenerative arthritis throughout the right knee joint. Claimant told him he had last worked in February 2008 and was terminated on March 7, 2008, because respondent could not accommodate his restrictions.

Claimant told Dr. Huston he began having problems with his right knee in late spring 2007. He told Dr. Huston about his ACL surgery on his right knee in the 1980s and said he had good results following that surgery. Claimant had a series of injections in his right knee in August 2007, which did not improve the symptoms.

Upon review of x-rays of the right knee, Dr. Huston stated that claimant's right knee showed quite advanced degenerative arthritis through all areas of the right knee joint.

"This arthritis was not caused by the injury to the left knee which occurred on 1-9-06. The arthritis was certainly a pre-existing situation at that time. At this point, he

⁴ P.H. Trans., Resp. Ex. A at 1.

⁵ P.H. Trans., Resp. Ex. A at 1-2.

certainly does need a total knee arthroplasty on the right but this is not as a result of the 1-9-06 injury.

. . . I believe there is no specific evidence to indicate that it was accelerated; however, the symptoms in the right knee which are primarily due to the degenerative arthritis may have been aggravated to some degree because of the gait disturbance that came about when the left knee was injured. This aggravation would only be to the right knee symptoms and not to the underlying arthritis process. . . . He does need total knee arthroplasty on the right.⁶

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁹

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

⁶ Report of Dr. Joseph Huston, filed Apr. 28, 2008, at 4-5.

⁷ K.S.A. 2007 Supp. 44-501(a).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁹ *Id.* at 278.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁰ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹¹ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹²

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,¹³ the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to all new and distinct accidental injuries. In *Stockman*,¹⁴ the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

¹⁰ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹¹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹² *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

¹³ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹⁴ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

In *Gillig*,¹⁵ the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,¹⁶ the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."¹⁷

In *Logsdon*,¹⁸ the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,¹⁹ the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

¹⁵ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

¹⁶ *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

¹⁷ *Id.* at 728.

¹⁸ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

¹⁹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

K.S.A. 2007 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In *Hensley*,²⁰ the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

In *Anderson*,²¹ the Kansas Court of Appeals stated:

Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.

An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.

A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

The Kansas Court of Appeals, in *Johnson*,²² held:

²⁰ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

²¹ *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

²² *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3, 147 P.3d 1091, rev. denied 281 Kan. __ (2006).

In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"²³

In *Martin*,²⁴ the Kansas Court of Appeals held:

Workers compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen to be at work.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.²⁶

ANALYSIS

Claimant's left knee injury and resulting left knee replacement surgery are not in dispute. What is in dispute is whether claimant's right knee condition and need for right knee replacement surgery is compensable under workers compensation as either a direct and natural consequence of his compensable left knee accident and injury or as a separate injury caused by claimant's work duties following his return to work from the left knee injury. There is scant evidence that claimant's job duties following his return to work for respondent after his January 9, 2006, accident would have caused injury to claimant's right knee absent the left knee injury and claimant therefore overusing his right knee by

²³ *Id.* at 788. See also *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

²⁴ *Martin v. CNH America LLC*, No. 97,707, unpublished Court of Appeals opinion filed Nov. 16, 2007, 2007 WL 4105361 (Kan. App.)

²⁵ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

²⁶ K.S.A. 2007 Supp. 44-555c(k).

compensating for his injured left knee. Respondent contends that claimant's right knee condition preexisted his left knee injury and that the consequences of the left knee injury and surgeries neither aggravated claimant's preexisting condition nor accelerated his need for right knee replacement surgery. In this regard, respondent relies primarily upon the testimony of Dr. Fevurly, who is in the unique position of having treated claimant's knee problems both before and after the January 9, 2006, accident. He believes claimant's need for right knee replacement is due to the preexisting condition and notes that claimant was advised in the late 1990s that he would likely require a right knee replacement in the future. Respondent also points to the independent medical report of Dr. Huston, who opined that claimant's need for right knee replacement is due to degenerative arthritis and that the degenerative arthritis was not aggravated or accelerated by the injury to claimant's left knee. However, Dr. Huston acknowledged that the symptoms in claimant's right knee from the degenerative arthritis may have been aggravated by the gait disturbance caused by the left knee injury. Although Dr. Huston opined that the aggravation was not to the underlying arthritis process but only to the symptoms, this aggravation is nonetheless significant because it is the degree of symptoms and claimant's ability to tolerate those symptoms that largely determines when knee replacement surgery is performed. And it is in this way that claimant's left knee injury accelerated claimant's need for right knee replacement surgery.

Claimant testified that he had little, if any, right knee pain immediately before and after his accident, but following his return to work for respondent, the right knee symptoms began and thereafter worsened to the point that he could not perform his former truck driving job. Dr. Curtis found that because of the left knee injury, claimant had to strain his right knee. As such, Dr. Curtis opined that claimant aggravated his right knee arthritis as a result of the January 9, 2006, injury. Likewise, Dr. Prostin determined that claimant accelerated the osteoarthritis in his right knee from favoring his left knee. Accordingly, Dr. Prostin related claimant's current need for right knee replacement surgery to the overuse and overcompensation following the left knee injury.

The medical records clearly show that claimant's right knee symptoms dramatically worsened following his return to work for respondent in June 2007. Claimant did not have those kind of symptoms during the months and years preceding the left knee injury or even during the months immediately after the January 9, 2006, accident. It was only after claimant began using his right knee more following his return to work with respondent that the significant right knee pain and swelling developed. No physician has testified that claimant's normal activities of day-to-day living or the normal aging process would have caused claimant's right knee to worsen to the same degree and resulted in the need for knee replacement surgery just as soon absent either the left knee injury or claimant's return to work. Accordingly, this Board Member finds that claimant's right knee condition was aggravated as a natural consequence of his left knee injury and that this aggravation accelerated the need for right knee replacement surgery.

CONCLUSION

Claimant aggravated his right knee condition as a direct and natural consequence of his left knee injury and resulting treatment. Claimant's worsened symptoms accelerated his need for right knee replacement surgery. Accordingly, claimant's right knee injury and current need for treatment arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 2, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Gerald L. Cooley, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge